No. 333

In the Supreme Court of the United States

October Term, 1955

Union Pacific Railroad Company;
Chicago and North Western Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Railway Company;
Northern Pacific Railway Company;
Great Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Wabash Railroad Company,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

ELMER B. COLLINS,
Counsel of Record for Appellants,
1416 Dodge Street,
Omaha, Nebraska.

F. O. STEADRY,
L. E. TORINUS,
WARREN H. PLOEGER,
ROLAND J. LEHMAN,
EUGENE S. DAVIS,
JAMES C. WILSON,
Of Counsel.

INDEX

INDEX—Continued

Statutes Cited:

INDEX—Continued

In the Supreme Court of the United States

October Term, 1955

No.————

Union Pacific Railroad Company;
Chicago and North Western Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Railway Company;
Northern Pacific Railway Company;
Great Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Wabash Railroad Company,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15, Revised Rules of the Supreme Court of the United States (effective July 1, 1954), appellants, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the district court entered in this case on February 14, 1955, following which that court modified its opinion and entered an order on April

22, 1955, overruling and denying motion for new trial or reargument and reconsideration.

Opinion Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611, and is attached hereto as Appendix B. The opinion of the three-judge district court was filed January 13, 1955, and has not been reported, but is attached hereto as Appendix D. The opinion, by the court's order entered April 22, 1955, was "modified by substituting for pages 14, 29, 31, 32 and 36 thereof" rewritten pages bearing the same numbers. Copy of that order and the rewritten pages are attached hereto as Appendix E. The court made no separate findings of fact or conclusions of law.

Jurisdiction

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants and the public service commissions of Washington, Oregon, Montana, Wyoming and Nebraska intervened as defendants in the district court.

The order was issued upon complaint filed with the Commission by the Rio Grande for the admitted purpose

of improving its financial condition by diverting traffic and revenues to its line from Union Pacific routes. The Rio Grande claimed that through routes via its line had "existed" many years for the traffic concerned, and that the prohibition in Section 15(4) of the Act against short-hauling existing routes did not apply. (See App. H, p. 4.) It demanded that joint rates be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic moved annually by those railroads for more than 75 years between points in the northwest area and points in the eastern and southern parts of the country described in the order.[1] The order issued by the Commission (copy attached hereto as Appendix C) requires, among other things, that these appellants and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific at least 925 miles and subjecting it and others of these appellants to large revenue losses.[2]

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it

---

1 The lines and termini of the Union Pacific and the Rio Grande (main line) are indicated on the map attached hereto as Appendix A. Figures in the oblongs on the map show the number of additional miles shipments would move via the Rio Grande compared to mileage via existing Union Pacific routes.

2 The validity of the order issued is now before this Court in Nos. 117, 118, and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

is the Commission's *failure to order* through routes and joint rates on the remaining two-thirds of the traffic which the Rio Grande seeks to annul and enjoin in this case. Such failure is not embraced in the order issued or in any "order" of the Commission.

Several shipper organizations, interested in obtaining financial benefit of a reduction in rates via the Rio Grande to the level of the joint rates over the shorter Union Pacific routes, intervened before the Commission and as plaintiffs in the district court.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

Final judgment and decree of the specially constituted three-judge district court, dated February 1, 1955, was entered February 14, 1955, annulling and setting aside the Commission's alleged order "insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs". On April 22, 1955, the district court entered an order in which it overruled and denied a motion of these appellants and others for new trial or reargument and reconsideration. Copies of the final judgment and decree and the order entered April 22, 1955 denying that motion are attached hereto as Appendices F and G.

Notice of appeal was filed by these appellants in the United States District Court for the District of Colo-

rado on June 20, 1955. On that date notices of appeal were also filed by the United States, the Interstate Commerce Commission and the States of Washington, Oregon, Montana, Wyoming and Nebraska.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479; *Moffat Tunnel League v. U. S.*, 289 U. S. 113; *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *Thompson v. United States*, 343 U. S. 549; (see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538).

Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix H hereto:

National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3) and 15(4).

Questions Presented

As stated, the Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and demanded that the lower joint rates maintained over the existing Union Pacific routes be made ap-

plicable via its line. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation (Section 15(4)(b), App. H, p. 4) for certain commodities named in the order, which comprise about one-third of the total volume of traffic, and required that the joint rates maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line.

For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in the order it issued.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court held that through routes via the Rio Grande do exist for the involved traffic and that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist. The court enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and to that extent, it "remanded" the case to the Commission for further proceedings in conformity with the court's opinion.

The following questions are presented by this appeal:

(1) Whether the court erred in refusing to dismiss the Rio Grande's complaint and intervening complaints on the ground that, as the Commission's failure to order through routes and joint rates on *all* instead of only a part of the traffic is not an "order" or a part of any order issued by the Commission, there is no jurisdictional basis for judicial review.

(2) Whether the district court erred in holding that plaintiff, the Rio Grande, admittedly lacking any legal or other right to traffic it seeks to divert to its line from other carriers, has standing to maintain this suit for the purpose of obtaining a "pecuniary profit" from that part of the traffic for which the Commission failed to order through routes and joint rates via the Rio Grande.

(3) Whether the court erred in making its own administrative finding that, "under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines", contrary to the Commission's finding that the evidence did not prove discrimination, and erred further in relying upon its own administrative finding to sustain the standing of the Rio Grande to maintain this suit.

(4) Whether the court erred in holding, in effect, that the Commission's finding that the evidence failed to prove discrimination against the Rio Grande and its failure to order through routes and joint rates on *all* instead of a part of the traffic, amounts to the denial

of a right given the Rio Grande by the [Interstate Commerce] Act adversely affecting its traffic and revenues, causing it to suffer pecuniary injury, and giving it "a right to judicial review of the order".

(5) Whether, in resting its decision that the Rio Grande has standing to maintain this suit upon several hypothetical or "if" propositions, the court erred in ignoring or giving no effect to the fact that, after full hearings and thorough consideration of the evidence, the Commission found that, except to the extent indicated in its findings, the evidence failed to prove discrimination against the Rio Grande or that through routes and joint rates by the Rio Grande are necessary in the public interest to provide adequate and more economic transportation, and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained".

(6) Whether the court erred in failing to hold that neither the Rio Grande nor intervening plaintiffs had standing to maintain this suit.

(7) Whether the court erred in holding that the Commission's finding that "there are at present no through routes, as that term is used in the Act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law, and whether the court further erred in its own holding that the existence of such through routes is established by the evidence and the law.

(8) Whether, in holding that through routes for the "bridge" traffic here concerned were in existence via the

Rio Grande, the court erred in refusing to consider the fact that the evidence showed through movement of only one shipment of non-emergency traffic via the Rio Grande over each of only 17 of the many hundreds of thousands of through routes of which the Rio Grande claims to be a part between the 2,900 railroad stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country.

(9) Whether, in holding that through routes were in existence via the Rio Grande for the traffic here concerned, the court erred in failing and refusing to indicate or specify the through routes held to be in existence via the Rio Grande or the termini of, or the railroads comprising such through routes, or the commodities for which the court holds that through routes exist via the Rio Grande.

(10) Whether, in view of the fact that the Commission overcame the short haul prohibition in Section 15(4) by ordering through routes and joint rates on all the commodities it considered upon the evidence to be necessary in the public interest, the court erred in holding that the Rio Grande and the "entire proceeding" were "prejudiced" by the Commission's finding that through routes did not already exist via the Rio Grande for the traffic it seeks.

(11) Whether, if the last preceding question is answered negatively, the court erred in annulling and setting aside "the order" *only* "insofar as it denied and withheld relief" to the Rio Grande.

(12) Whether the court erred in holding that the Rio Grande was entitled to have the Commission, in de-

terminating whether joint rates via the Rio Grande should be required "apply the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes".

(13) Whether the court exceeded its powers in making its own finding that the evidence proved discrimination against the Rio Grande, and thereupon in "remanding" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court".

(14) Whether the court erred in failing to consider and review the entire record and all the issues tendered in briefs and arguments of the parties.

Statement of the Case

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[3] Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (App. B, p. 74), and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial neces-

3 *Denver & Rio Grande Investigation*, 113 I.C.C. 75; *Reconstruction Finance Corp. v. Denver & R.G.W.R.Co.*, 328 U.S. 495.

sities", than rates prescribed for other western railroads.[4]

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"[5] but its management soon determined to enhance its financial position by diverting traffic from other lines for a "bridge"[6] haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.

Concentrating on its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traf-

---

4 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry. Co.*, 19 I.C.C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I.C.C. 481, 486; *Livestock-Western District Rates*, 176 I.C.C. 1, 98 and 190 I.C.C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I.C.C. 663.

5 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry., supra*, P. 221.

6 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

fic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates[7] over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this statement as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.[8]

---

7 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions." (App. B, p. 6.)

8 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyming and Nebraska to and from Missouri River gateways rather than over the Rio Grande, "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (App. B, p. 21.)

These joint rates do not apply via the Rio Grande, except in connection with routes over the Southern Pacific to Ogden and over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City, on traffic to and from that part of the northwest area lying north of the southern boundary of Oregon and west of the irregular black line shown near the left or west end of the map attached hereto as Appendix A. The joint rates over Union Pacific routes are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included in all of the multitude of through routes of other railroads to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific (see figures in oblongs on map, Appendix A hereto), and would range from 33 percent to more than 50 percent longer than routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted,

with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.[9]

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, two oral arguments before the full Commission, it issued the order herein assailed, January 12, 1953. Petitions for reconsideration were denied June 10, 1953.

The order (App. C, hereto) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated

---

9 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would result in a potential estimated revenue loss to the Union Pacific alone of more than $1,000,000 annually, and in very large losses to others of the railroad appellants.

The order does not require through routes and joint rates with the Rio Grande on the remaining two-thirds of the traffic, and the Rio Grande's purpose in this suit is to enhance its financial gains still further by having the Commission require that the joint rates over existing Union Pacific routes be made applicable via the Rio Grande on the remaining two-thirds of the traffic.

The Commission's Findings and Conclusions

The Commission made the following statement of the Rio Grande's contention concerning the existence of through routes via its line:

> "The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15(4) are not applicable and need not be considered." (8)[10].

After discussing the decision in *Thompson v. United States*, 343 U. S. 549, in which this Court nullified a Commission order based on the theory that a through route already existed over two connecting railroads because

10 Figures in parentheses refer to findings at pages of the Commission's report, as printed in Appendix B hereto.

the route was open to traffic at the combination of their local rates, the Commission carefully analyzed the contentions and the testimony concerning the alleged existence of through routes via the Rio Grande in this case, and made the following finding and statements which are material to consideration of the questions presented by this appeal:

> "We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] [3 Except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.
>
> "The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together." (14)

Other findings by the Commission[11] that are material to consideration of the questions presented are:

1. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (72);

2. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseable future" (60) over routes that are shorter than Rio Grande routes;

3. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (64-65);

4. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficuty in marketing their products by reason of the lack of competitive joint

11 The Commission's findings are set out here rather fully not only because of their materiality to consideration of the questions presented but also because of the apparent conflict and inconsistency between them and the district court's findings and conclusions.

through rates over the Rio Grande, and would not use that carrier in any event (65);

5. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (25), and that routes via the Rio Grande would be from 33 to 50% longer than many of the Union Pacific routes (75);

6. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (60), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (74);

7. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (27);

8. That the traffic sought by the Rio Grande ordinarily moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (21);

9. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made ap-

plicable over its line (67); but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (35);

10. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (76);

11. That the evidence failed to prove that the Union Pacific and other lines maintaining present through routes and joint rates discriminate against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3(4) of the Act in refusing to include its line in present through routes and joint rates (77);

12. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable and unduly prejudicial to shippers using, or desiring to use, the Rio Grande routes and unduly pref-

erential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (79);

13. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (72);

14. That the present complex and far-flung marketing system for perishable food articles requires that such articles move to market with expedition and care "over as many routes as possible" (73) to "as many markets and outlets as possible" (51) with "as much flexibility as possible" and without "unnecessary interruptions" (73);

15. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (73), (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products

via Union Pacific routes in all 48 states and several foreign countries);

16. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (74);

17. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (78).

Opinion of the District Court

The district court decided only two of the numerous issues tendered by the pleadings, briefs and oral arguments. On these two issues it held:

1. That the Rio Grande has standing to maintain suit to enjoin and annul the Commission's failure to include in its order about two-thirds of the "bridge" traffic for which the Rio Grande demanded joint rates via its line, and the court overruled a motion to dismiss the suit for lack of such standing;

2. That the Commission erred as a matter of law and upon the evidence in finding that the through routes

claimed by the Rio Grande were not already in existence, that the evidence and the law established the existence of the claimed through routes, and that the Commission should have applied the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act "free of any of the limitations imposed by §15(4) with respect to establishing through routes."

In reaching its conclusion that the Rio Grande has standing to maintain its suit, the court made and apparently relied upon the following administrative finding of fact:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (App. D, p. 23.)

The court held that the Rio Grande is here seeking rates "which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande" (App. D, pp. 20-21), giving it a right to judicial review.

With respect to the Commission's finding that the claimed through routes via the Rio Grande were not in existence, the court held—

> "This erroneous self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." (App. D, p. 11.)

Nevertheless, the court "remanded" the case to the Commission "with appropriate instructions" for fur-

ther proceedings in conformity with the opinion *only* insofar as the Commission failed to order through routes and joint rates on the traffic not included in the order.

The court's opinion is vague, ambiguous and lacking in specificity with respect to the grounds or reasons for its conclusions. For example, in holding that the Rio Grande has standing to maintain its suit the court admits that in ordering only such through routes and joint rates as it found to be in the public interest, and in failing to include all of the traffic in its order the Commission "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had" and from these points of view "caused no pecuniary loss to the Rio Grande" (App. D, p. 19). It holds, nevertheless, that the Rio Grande suffers "pecuniary injury" because the Commission's order does not include all of the traffic, but it then holds that "we do not think such injury is essential to the right to judicial review."

The court holds that the Commission's failure to order joint rates that would result in "pecuniary profit" to the Rio Grande from traffic not included in the order prevented it from "enjoying increased traffic and increased earnings", but it does not hold that the Rio Grande has any legal or other right to divert the traffic to its line from Union Pacific routes to create or produce such additional pecuniary profit or increased earnings, nor does it hold that the Commission's failure to order joint rates on the portion of the traffic not included in its order is beyond its power or without support of evidence or adequate findings.

The court holds that "if" the Rio Grande's presentation to the Commission entitled it to an order re-

quiring joint rates on all of the traffic then the Commission's failure to issue such an order was the denial of a right granted by the Act giving the Rio Grande "a right to judicial review of the order." Such speculative or hypothetical discussions ignore the fact that the Commission had already found upon the evidence that the Rio Grande had failed to sustain the allegations of its complaint, except to the extent indicated in the order; and, as just stated, the court does not hold that the Commission acted arbitrarily or contrary to law or the evidence in limiting the required joint rates to the commodities named in the order for which the Commission found through routes and joint rates necessary in the public interest to provide adequate and more economic transportation.

Contrary to the Commission's finding, the court holds that continuance of the combination rates via the Rio Grande on traffic not included in the order results in discrimination adversely affecting the Rio Grande and shippers over its line, but it does not hold that its own finding of discrimination, or a finding of discrimination even if made by the Commission, would justify or require the Commission to order joint rates with the Rio Grande for all or any part of the traffic. In short, the court refrains from specifying or permitting its opinion to disclose any particular reason or ground for its conclusion that the Rio Grande has standing to maintain this suit.

The court's conclusion that through routes already exist via the Rio Grande for the traffic concerned is likewise shrouded in vagueness and lack of specificity concerning the reason or ground upon which the conclusion

rests. The opinion does not indicate or specify the through routes it holds are in existence via the Rio Grande, or the termini of, or the railroads comprising such through routes, or the commodities for which any of such through routes are in existence via the Rio Grande.

The opinion states that the definition of a "through route" in *Thompson v. United States*, 343 U. S. 549, compels the conclusion that the through routes claimed by the Rio Grande are already in existence, but it fails to disclose what language of that definition compels its conclusion that through routes exist here. The opinion describes a few shipments of traffic moved via the Rio Grande in 1948 at combination rates and relied upon by the Rio Grande to prove that through routes exist via its line for all of the involved traffic, but the court refused to commit itself to the proposition that evidence showing that a few shipments of a few commodities moved via the Rio Grande during one year from a few points east of Denver to the northwest area is sufficient to prove that through routes for all commodities exist via the Rio Grande or that the Rio Grande is a part of each of the many hundreds of thousands of through routes presently maintained by other carriers, for the traffic concerned between some 2,900 railroad stations in the northwest area and more than 39,000 stations in the eastern and southern parts of the country.

In holding that through routes via the Rio Grande were open and in existence through the Ogden gateway, the court not only reversed the Commission but also ignored the testimony of the Rio Grande's President that "ever since I have been with the property I have been looking forward *to the opening of the Ogden gateway*

and the publishing of through rates through there" (I. C. C. Transcript, p. 43), and ignored also the testimony of "numerous shippers in this proceeding" that Rio Grande routes through the Ogden gateway are not considered as open or through routes, "but as routes that are closed to shippers because of the higher rates applicable" (I. C. C. Report, App. B, pp. 8-9).

The court does not give any reason or indication why it disagrees with the Commission's finding that through routes claimed by the Rio Grande do not exist within the meaning of the Interstate Commerce Act.[12] Instead, the court simply asserts, without reason, that the claimed

12. In deciding that the claimed through routes via the Rio Grande do not exist, the Commission said:

"So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

"Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N.W. Ry. Co., supra*, cited with approval by the Supreme Court in

(Continued on next page)

through routes *do* exist, and undertakes to direct the Commission to proceed further upon that assumption but *only* insofar as it has previously failed to require through routes and joint rates as demanded by the Rio Grande on all commodities.

The Questions Are Substantial

The questions presented have a far-reaching future effect not only upon railroads generally that have established through routes and channels of commerce and upon the public that is dependent upon such established routes, but also in the field of judicial review of the Commission's orders and those of other Federal agencies, in the relations between those agencies and the Federal courts and in the Commission's administration of the Interstate Commerce Act, especially the through routes provisions of Section 15(3) and (4).

1. This Court has held that jurisdiction is lacking to review "matter embodied in a [Commission] report and not followed by a formal order." *United States v.*

(Continued from preceding page)

Thompson v. United States, supra. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I.C.C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra*.

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation." (App. B, pp. 12-14).

Atlanta, B. & C. R. Co., 282 U. S. 522, 528.[13] This seems necessarily to follow from the fact that the act that confers jurisdiction (Urgent Deficiencies Act, 38 Stat. L. 219; 28 U. S. C., Secs. 1336, 1398) clearly makes the existence or presence of an "order" embodying the matter complained of prerequisite to jurisdiction to review.

The order issued in the instant case (Appendix C hereto) affirmatively requires through routes and joint rates for about one-third of the traffic demanded by the Rio Grande, but the order does not embody or mention the Commission's failure to grant through routes and joint rates nor does it dismiss the complaint as to the remaining two-thirds of the traffic. While the Rio Grande's complaint asked the lower court to enjoin and annul the "order," "in part, if its arguments (except as to the existence of through routes) were directed to the Commission's failure to require through routes and joint rates on the remaining two-thirds of the traffic. But, as noted, such failure was not embodied in the order issued or in any other order.[14]

---

13 In that case the Commission had made a finding of the amount representing the railroad's investment in road and equipment. It issued no order, but concluded its report with this statement:

"The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

14 The Commission's report concludes with the statement:

"That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

"An appropriate order will be entered."

The Rio Grande argued in the district court that the order must be read in the light of the report, and that by doing so here, the language just quoted becomes the "equivalent" of an order. But this cannot be sound, for the statute confers jurisdiction to review any "order"—and not an "equivalent" of an order. A much closer "equivalent" to an order was held insufficient to afford jurisdiction in the *Atlanta, B. & C.* case *supra*.

(Continued on next page)

Apparently recognizing that there is no order embodying the matter of which the Rio Grande complained, the district court sought to overcome that obstacle by saying (App. D, p. 19) that—

> "The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief"

citing *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80. But in both of those cases formal orders had been issued. Thus, the court construed the Commission's failure to grant the Rio Grande's full demands as a "negative portion" of the affirmative order actually issued, and in that way attempted to create the prerequsite for its jurisdiction. The court confused the abolition of the "negative order doctrine" in the *Rochester* case with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, and it also overlooked the fact pointed out in *United States v. Atlanta, B. & C. R. Co., supra*, that—

> "No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review." (p. 528)

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, the Commission had issued an order requiring the carriers to establish certain specified joint rates, but it declined to comply with the demand of some of the car-

---

(Continued from preceeding page)

Moreover, while this Court has held that the order may be read in the light of the report for the purpose of clarifying ambiguity or vagueness in the order issued, *Georgia Comm. v. United States*, 283 U.S. 765, 771, this Court has never held that this may be done for the purpose of creating an order, or of "importing" into an unambiguous order matters not embodied therein.

riers that it also prescribe divisions of the joint rates required. This Court noted at pages 482-483 that—

> "* * * the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. * * * The real ground for resorting to the courts in this case is the failure to fix divisions."

The Court reviewed the affirmative order issued but refused to review the Commission's failure to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it."

In *Chicago Junction Case*, 264 U. S. 258, the Court cited several cases in which—

> "judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought,"

and the Court "declined to interfere" because to do so would have involved exercise by it of "the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied" (p. 264).

The district court erroneously "stretched" this Court's "negative order" ruling in the *Rochester* case to include cases in which the Commission has issued no order at all embodying its failure to grant all of the Rio Grande's affirmative demands.

Since the statute confers jurisdiction only where an "order" has been issued embodying the matter com-

plained of, and as no such order has been issued in this case, we submit that this Court should correct the lower court and refuse to permit a new ground for increasing the volume of litigation in Federal courts in attempts of litigants to override the Commission's exclusive administrative functions.

2. This Court has consistently held that standing to maintain a suit to enjoin an order of the Commission requires a showing that the order assailed subjects the complainant to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive the complainant of something it has long and lawfully possessed, or would disrupt the transportation situation causing the complainant financial or economic loss, or that the right to maintain such suit rest upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry* v. U. S., 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

Disregarding the settled rule of these decisions, the district court held that the Rio Grande has standing to maintain this suit despite its frank admission that its purpose in complaining to the Commission was to improve its financial position by diverting traffic from Union Pacific routes for a "bridge" haul over its line, and despite its utter lack of any legal, equitable or other right to the traffic it seeks to divert to its line, *A., T. & S. F.*

Ry. v. United States, 279 U. S. 768, 780.[15] Although the district court refrained from specifying the ground or reason for its holding that the Rio Grande has legal standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande * * * the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande," but that such injury is not essential to the right to judicial review (App. D, pp. 20-21).[16]

---

15 On this point the Rio Grande argued as follows at page 111 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Valley R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I.C.C. 665, 679. In *United States v. American Railway Express Co.*, 265 U.S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

16 The confused and hypothetical rationale of the district court's opinion seems to be: that the Rio Grande had a right to complain of discrimination to the Commission; that "if" the evidence proved the discrimination or that the Rio Grande was entitled to an order requiring establishment of the joint rates, then the failure of the Commission to order joint rates on all of the traffic "was the denial of a right given [the Rio Grande] by the Act," and, therefore, the Rio Grande has standing to maintain suit to enjoin such failure or denial.

But this ignores the fact that the Commission found that the evidence did not prove discrimination against the Rio Grande, or that joint rates were necessary in the public interest except as to articles named in the order, and it ignores also the Rio Grande's utter lack of any legal or other right to the traffic it seeks. Its right to complain to the Commission clearly gave it no standing to sue. *Edward Hines Trustees v. U.S.*, supra; *Sprunt & Son v. United States*, *supra*, *Pittsburgh & W. Va. Ry. v. U.S.*, *supra*.

In final analysis, the court's decision that the Rio Grande has standing to maintain the suit inescapably rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap pecuniary profit and enhance its revenue from *all*, instead of a part, of the traffic it seeks to divert to its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit the complainant must show that he is threatened with a "loss" against which he is legally or equitably entitled to protection. *Railroad Co. v. Ellerman*, 105 U. S. 166; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. If, as held in the cases just cited, a complainant has no standing to maintain a suit to enjoin acts of others which threaten even to destroy his business unless he shows that such acts invade some legal or equitable right of his, *a fortiori* the Rio Grande has no standing to maintain suit to enjoin the Commission's failure to grant its full demands for "pecuniary profit" to be obtained by diverting to its line traffic to which it admits that it has no semblance of legal or other right. *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76.

The decision of the district court thus opens up a new approach and avenue for a very considerable increase in the already heavy volume of litigation in the Federal district courts and in this Court involving the validity of orders of the Commission and other Federal agencies. We submit that it is of substantial public

importance that this Court prevent any such future potentiality by reviewing and reversing the holding of the district court that the Rio Grande has standing to maintain this suit.

3. In reversing the Commission's finding that through routes via the Rio Grande are not in existence within the meaning of the Act, the district court misconstrued or refused to be guided by this Court's decision in *Thompson v. United States*, 343 U. S. 549, and by the principles stated in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, concerning the existence of through routes and the legislative policy against diversion of traffic from one carrier for the benefit of another.

Instead of reviewing and considering all of the evidence as required by this Court's decision in *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488, the district court was content to "rest our decision upon a narrow ground," and upon a "brief and sketchy statement of the case" (App. D, p. 11). It purported to "summarize" the evidence bearing on the question whether through routes via the Rio Grande already existed for the traffic it seeks. It cited the fact, admitted by counsel and a traffic witness for the Union Pacific, that the traffic *could* move via the Rio Grande if shippers wanted to pay the higher combination rates.[17]

The court also cited the fact that through routes and joint rates via Rio Grande had been established by the receivership courts in 1897 and that the joint rates were cancelled by Union Pacific in 1906 and 1912, after the receiverships ended, but the court holds that this

17 This same fact was admitted in the *Thompson* case, *supra*, but was held to be no proof of the existence of a through route within the meaning of the Act (p. 558).

did not close the through routes. In so holding the court ignored the testimony of Rio Grande's President that for many years he had looked forward to the "opening" of the Ogden gateway, and the testimony of numerous shippers that the routes were considered as "closed to shippers because of the higher rates applicable" (App. B, pp. 8-9). The court further ignored the fact that, in a "pamphlet" propaganda campaign before and after filing its complaint August 1, 1949, the Rio Grande asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would induce shippers to aid it in its efforts. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.[18]

---

18 Among the 20 questions were the following:

" 2 What Is Meant by the 'Closed' Gateway at Ogden?"
" 3 What Is the Effect of the Closed Gateway?"
" 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
" 7 Will the Open Ogden Gateway Reduce Freight Rates?"
" 8 Will the Open Gateway Provide Improved Service?"
" 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

The district court states that the definition of "through route" in the *Thompson* case "compels us to conclude that the through routes contended for by the Rio Grande were in existence", but it does not specify which of the several elements of that definition compels such conclusion. It merely states that in that case there was no evidence that a shipment had ever been made from termini to termini of the route there in question or that the carriers had ever offered through service over that route. The court then points to 18 shipments moved at combination of local rates in 1948 over the Rio Grande from 18 origins in the middlewest and southwest to destinations in the northwest area and to a few emergency shipments, and 37 shipments that moved from the northwest to destinations on the Rio Grande. Neither the latter nor the emergency shipments could be involved in this case.

But the court refused to decide whether these few isolated and sporadic shipments during the year 1948 were sufficient, under the "user" test of the *Thompson* decision, to prove the existence of through routes via the Rio Grande between the 39,000 railroad stations in the eastern area and the 2,900 stations in the northwest area, between each of which there is at least one through route, or a minimum of 113,100,000 through routes, of which the Rio Grande claims to be a part.

Every relevant or material factor recited in the opinion of the lower court in support of its conclusion that through routes exist as claimed by the Rio Grande was rejected or held insufficient by this Court in annulling the Commission's order in the *Thompson* case.

The Commission in the instant case held that the few sporadic shipments moved in 1948 did not prove the existence of through routes via the Rio Grande for the involved traffic (*ante* p. 26). Applying the principles of the *Thompson* decision, the Commission correctly concluded that the carriers in this case do not "hold themselves out as offering through transportation service" for the involved traffic, as indicated by their "course of business" and by the Union Pacific's course of conduct over many years in its steadfast refusal to relinquish its long haul.

Although the district court's decision is indefinite and lacking in specificity as to the precise reason why it holds that through routes are in existence for the involved traffic via the Rio Grande, it sanctions a new and unprecedented standard or set of circumstances for determining whether through routes exist, which not only conflicts with the principles laid down in the *Thompson* case, but is also at war with the plain purpose of the Act in conferring the through routes power on the Commission carefully limited so as to protect the long hauls of carriers except under specified circumstances. *Thompson* case *supra*, *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551.

If the lower court is correct in holding upon the facts and circumstances in this case that through routes for the involved traffic are in existence via the Rio Grande, then through routes are established and are in existence over the lines of all railroads that physically connect and have published local rates as required by Section 6(1) of the Act. And, under that holding, the line of every railroad is a part of every through route

in the country by virtue of such physical connections and required publication of local rates over its line.

The decision would have a drastic and revolutionary effect upon the Commission's administration of its through routes powers[19] and as held in the *Thompson* case, *supra*, p. 560—

> "* * * would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage".

The decision would have a devastating effect upon appellants and railroads generally that have established through routes and channels of commerce, in reliance upon the protection afforded by Section 15(4) of their long hauls of traffic they originate or terminate.[20] Towns

---

19 In a recent case, *Steinmetz v. Atchison, T. & S.F. Ry. Co.*, 293 I.C.C. 202 (decided Aug. 17, 1954), the Commission held that a through route does not exist within the meaning of Section 15 (4) of the Act over the lines of railroads that have published only the local rates for their respective lines, i.e. where the carriers have not published joint rates. At pages 203-204 the Commission said:

"Consideration has been given to the decision in *Thompson* v. *United States*, 343 U.S. 549, decided since the reparation awards were made in prior decisions. There in the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15 (4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate. * * *"

20 See *U.S. v. Great Northern R. Co.*, 343 U.S. 562, wherein this Court held at pages 574-575:

(Continued on next page)

and communities that have grown up and are dependent upon such established routes and channels of commerce would also suffer seriously adverse economic consequences if the district court's decision is allowed to stand.[21]

4. The district court's decision and judgment present aspects of the relations between the Commission and the courts which are of fundamental public importance. The district court holds that the Commission's finding that through routes do not exist via the Rio Grande for the involved traffic "obviously prejudiced the entire proceeding", but the court "remands" the case to the Commission *only* "insofar as it denied and withheld relief" to the Rio Grande. Contrary to the Commission's finding, the court made its own administrative finding of fact that continuance of the Rio Grande's combination

---

(Continued from preceding page)

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15 (4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

21 This is evidenced by the following statement of position in their brief in the district court by the five intervening States that have also appealed from the decision below:

"These states were moved to intervene in the proceeding before the Commission because of the overwhelming detriment the shippers and general public of such states would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to shippers and would also inflict

(Continued on next page)

rates on the traffic not included in the Commission's order would result, in discrimination against the Rio Grande and shippers over its line.

Thus, in remanding the case to the Commission "for further proceedings in conformity with this opinion", but only insofar as the Commission denied relief to the Rio Grande, the court would not only prevent the Commission from reconsidering the portion of the "prejudiced" proceeding which is favorable to the Rio Grande, but would also tie the Commission's hands by requiring it to reverse its previous administrative judgment and finding that the evidence did not prove discrimination against the Rio Grande. In short, apart from a complete lack of power to "remand" the case to the Commission, in doing so the court virtually directs the Commission to order joint rates on the remaining two-thirds of the traffic. The court would clearly usurp the Commission's administrative authority and render its functions useless, contrary to decisions of this Court. *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470.

(Continued from preceding page)

very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

"It was made indisputably clear by these states that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening states."

Conclusion

It is submitted that the questions presented by this appeal are substantial and of general public importance, and that a decision of this Court correcting and reversing the decision of the lower court is essential.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record for Appellants,
1416 Dodge Street,
Omaha, Nebraska.

F. O. STEADRY,
L. E. TORINUS,
WARREN H. PLOEGER,
ROLAND J. LEHMAN,
EUGENE S. DAVIS,
JAMES C. WILSON,
Of Counsel.

August, 1955.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Statement as to Jurisdiction on the several parties thereto, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

5. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

6. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

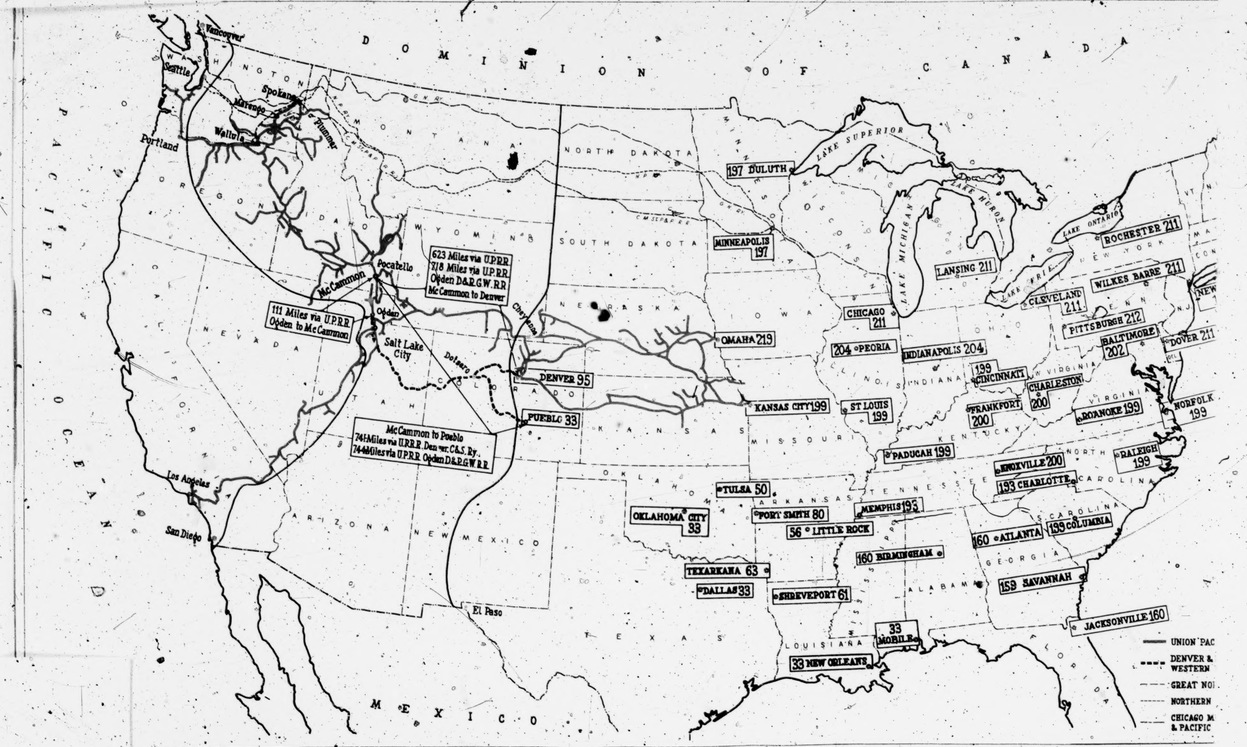
7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

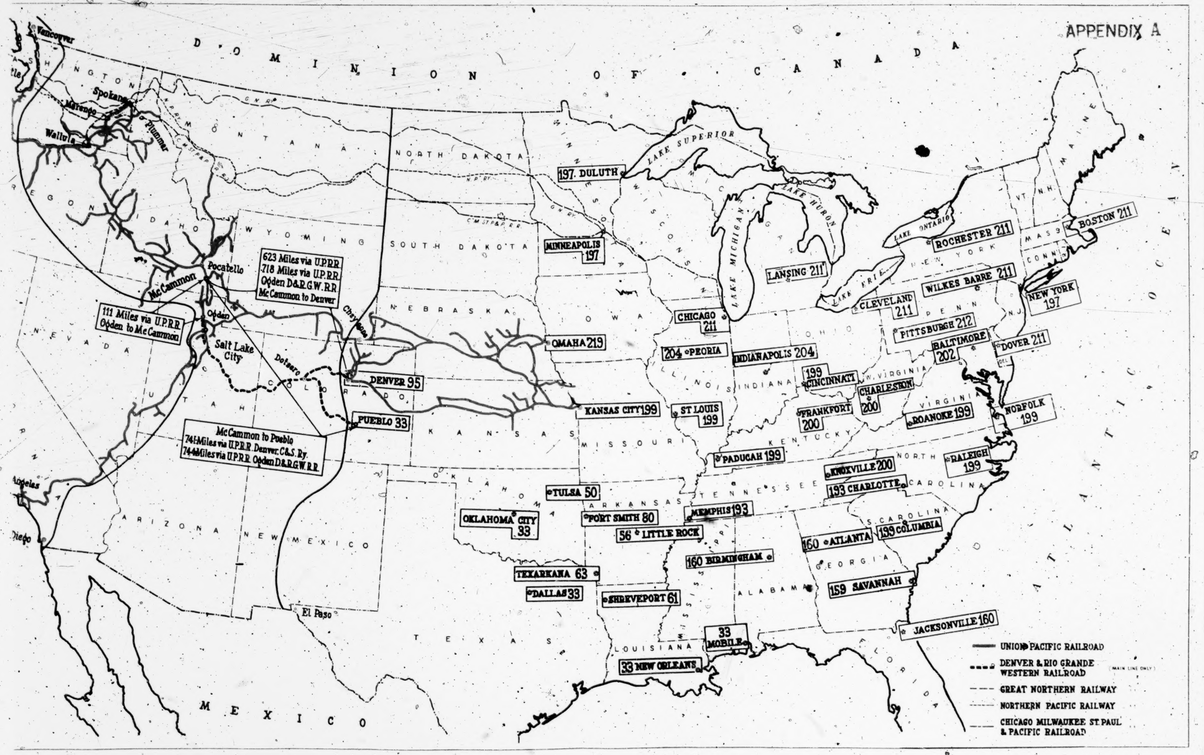
Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
Counsel of Record for
Appellants Herein.


DOMINION OF CANADA
Vancouver
Seattle
Portland
Spokane
Harlowe
Wallula
Pocatello
McCammon
Ogden
Salt Lake City
Denver
Pueblo
Los Angeles
San Diego
El Paso
MEXICO
623 Miles via UPRR
718 Miles via UPRR
Ogden D&RGW RR
McCammon to Denver
111 Miles via UPRR
Ogden to McCammon
McCammon to Pueblo
741 Miles via UPRR Denver C&S Ry.
744 Miles via UPRR Ogden D&RGW RR
197 DULUTH
MINNEAPOLIS 197
CHICAGO 211
204 PEORIA
INDIANAPOLIS 204
LANSING 211
ROCHESTER 211
CLEVELAND 211
WILKES BARRE 211
PITTSBURGH 212
BALTIMORE 202
DOVER 211
OMAHA 219
KANSAS CITY 199
ST LOUIS 199
CINCINNATI 199
FRANKFORT 200
CHARLESTON 200
ROANOKE 199
NORFOLK 199
PADUCAH 199
KNOXVILLE 200
RALEIGH 199
193 CHARLOTTE
TULSA 50
OKLAHOMA CITY 33
FORT SMITH 80
MEMPHIS 193
56 LITTLE ROCK
160 BIRMINGHAM
160 ATLANTA
135 COLUMBIA
TEXARKANA 63
DALLAS 33
SHREVEPORT 61
159 SAVANNAH
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PAC
DENVER & WESTERN
GREAT NO
NORTHERN
CHICAGO M & PACIFIC


DOMINION OF CANADA
Vancouver
Seattle
Portland
Spokane
Harlowe
Wallula
Pocatello
McCammon
Ogden
Salt Lake City
Denver
Pueblo
Los Angeles
San Diego
El Paso
MEXICO
623 Miles via UPRR
718 Miles via UPRR
Ogden D&RGW RR
McCammon to Denver
111 Miles via UPRR
Ogden to McCammon
McCammon to Pueblo
741 Miles via UPRR Denver C&S Ry.
744 Miles via UPRR Ogden D&RGW RR
197 DULUTH
MINNEAPOLIS 197
CHICAGO 211
204 PEORIA
INDIANAPOLIS 204
LANSING 211
ROCHESTER 211
BOSTON 211
CLEVELAND 211
WILKES BARRE 211
NEW YORK 197
PITTSBURGH 212
BALTIMORE 202
DOVER 211
OMAHA 219
KANSAS CITY 199
ST LOUIS 199
CINCINNATI 199
FRANKFORT 200
CHARLESTON 200
ROANOKE 199
NORFOLK 199
PADUCAH 199
KNOXVILLE 200
RALEIGH 199
193 CHARLOTTE
TULSA 50
OKLAHOMA CITY 33
FORT SMITH 80
MEMPHIS 193
56 LITTLE ROCK
160 BIRMINGHAM
160 ATLANTA
135 COLUMBIA
TEXARKANA 63
DALLAS 33
SHREVEPORT 61
159 SAVANNAH
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILWAY COMPANY v. UNION PACIFIC RAILROAD COMPANY, ET. AL.

Submitted October 16, 1952. Decided January 12, 1953

---

1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.

2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.

3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.

4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, Otis J. Gibson, and *H. L. Mulliner* for complainant.

Elmer B. Collins, L. H. Anderson, John B. Burchell, Robert H. Bierma, L. E. Clarahan, F. H. Cole, Jr., Eugene S. Davis, Lee S. Davis, P. H. Draver, F. G. Fitzpatrick, P. F. Gault, R. J. Hagman, L. W. Hobbs, Roland J. Lehman, B. P. Leverich, James E. Lyons, E. F. McGuire, F. J. Melia, Conrad Olson, W. R. Rouse, James S. Souby, Jr., Carson L. Taylor, and *L. E. Torinus, Jr.,* for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling, Carl R. Bullock, Henry A. Cockrum,* and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton, John H. Winchell, Joseph W. Hawley, T. S. Wood,* and *Ralph Sargent, Jr.,* for Public Utilities Commission of the State of Colorado; *W. B. Joy, H. N. Beamer, B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck, Harold A. Palmer, Bert L. Overcash,* and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench* for Public Utilities Commissioner of Oregon; *Smith Troy, Phil H. Gallagher, Joseph Starin,* and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett, Donald Hacking, W. R. McEntire,* and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, Chas. E. Blaine, Maurice H. Greene, Alden T. Hill, E. K. Kohlwes, Lowe P. Siddons, Reginald T. Titus, and *Lee J. Quasey* for other interveners.

Report of the Commission

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and cer-

tain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

---

1 Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

2 This area is referred to in this report as the northwest area or territory.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Association, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when

the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes,

we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and the public interest as well as the national transportation policy will be served by the establishment of such rates.

Through Routes

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or

through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such

> through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment,

paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destinations so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February, 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by

the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra,* cited with approval by the Supreme Court in *Thompson v. United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over

the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower that the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

---

3 Except on east-bound shipments of sheep and goats, to which reference is made later in this report.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15 (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

Proponents' Testimony

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common

points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January, 1936, as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg., the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification,* 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard

gage in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates

between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was required to divest itself of control of the Southern Pacific. *United States v. Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915,

when they were canceled by the Union Pacific. *Ogden Gateway Case,* 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as the Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization,* 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa

Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51 miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point

south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points

4 Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From

5 Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a

haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chicago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho, to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		Miles	Miles	Percent
Omaha, Nebr.	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo.	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn.	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo.	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill.	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa.	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va.	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C.	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md.	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va.	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y.	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla.	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex.	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark.	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn.	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La.	(6)	1,970	(5)	2,003	33	1.7
Atlanta, Ga.	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga.	(3)	2,327	(5)	2,486	159	6.8

1 Union Pacific through Wyoming to Omaha.
2 Union Pacific to Ogden, Rio Grande to Denver.
3 Union Pacific through Wyoming to Kansas City.
4 Union Pacific to Pacific Junction, Kans.
5 Union Pacific to Ogden, Rio Grande to Pueblo.
6 Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 per cent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company con-

necting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 per cent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wal-

lula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul; and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula

since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. East-bound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		Miles
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(2)	1,911
St. Louis, Mo.	(3)	2,200	(2)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(5)	2,272
Dallas, Tex.	(4)	2,226	(5)	2,045

1 Union Pacific to Omaha.
2 Union Pacific to Provo and Rio Grande to Denver.
3 Union Pacific to Kansas City.
4 Union Pacific to Denver.
5 Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. Of these, (1) 81.7 percent originated in eastern

Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Ogden or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,588 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Ogden, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-

Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as ori-

6 Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

ginated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and moved over that carrier as a part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriculture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional

annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percent-

ages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942-45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in 1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in

1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934, and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and

in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows:

Building Materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distributor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-

than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in

Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to slfip in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded to points on the Union Pacific at charges no greater than apply on similar

shipments moving over the Union Pacific. However he did not know what effect this would have on the parent company as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen competition cannot be met when

shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privilege at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections of Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was

submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the

sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the new-born, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and con-

necting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver t the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer

of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (196 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may at

tain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, or 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Mis-

souri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have established over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch v. Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the ex-

tent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads

moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect: Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out of line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the

Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rate in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates. Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans

on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables,

including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the

rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the

same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and mill work from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points

on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and re-

shipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

Opposition Testimony

The Union Pacific operates about 9,724 miles of railroad serving over 1,000 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

7 Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and west-bound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the teritories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a fotal of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye

track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949 the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway

operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. That is contrasted with the results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's re-

quest for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. '87, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submitted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic asso-

ciations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made.

Shippers have a right to route their own traffic, and where traffic is not routed by the shipper, the originating carrier has the right to control the routing within certain limitations.

General Discussion and Ultimate Fact Findings

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18

cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those con-

sidered in *United States v. Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co. v. United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests," * * that both interests should be considered and a fair balance found."

These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing system has been evolved to provide as orderly a distribu-

tion of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing,

or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra.* There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra*; and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating con-

ditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately, from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls

between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates the same as those in effect over the routes of

the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

Conclusions

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans.,

to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its

connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section (3) (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the sit-

nation which prevailed in the prior years and which continued up to the time of the hearing.

"I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson v. United States*, 343 U. S. 549. In the *Beaman* case single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodities have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry. v. United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson v. United States, supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evide shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points

on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that better supply of cars is available to shippers who have com-

petitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from

and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows,

that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination

rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that

it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for

the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941-42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without op-

position or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by the United States Supreme Court in

Thompson v. United States, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained there is substantial evidence that the rate situation results in undue prejudice and undue

disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors, dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden,

and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity

and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm. v. United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in

adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectively our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and necessary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did not participate in the disposition of this proceeding.

From—	To—	Commodity	Rates [1]		Distances [2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates [3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	163	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	29.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	136.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,356	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products.	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

APPENDIX C

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 4492 Civil

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Dennis McCarthy and Robert E. Quirk (Herbert M. Boyle was with them on the brief) for plaintiff.

Mr. E. Riggs McConnell (Messrs. Stanley N. Barnes, James E. Kilday, and Donald E. Kelley, were with him on the brief) for the United States of America, defendant.

Mr. Samuel R. Howell (Mr. Edward M. Reidy was with him on the brief) for the Interstate Commerce Commission, defendant.

Messrs. Elmer B. Collins, F. O. Steadry, A. E. Torpus, Jr., and Eugene S. Davis (Messrs. F. J. Melia, Warren H. Ploeger, Roland J. Lehman, Carson L. Taylor, E. G. Knowles, W. R. Rouse, Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, and Joseph H. Miller were with them on the briefs) for intervening railroad defendants.

Messrs. W. J. Hickey, John R. Barry, and Lee J. Quasey (Messrs. Duke W. Dunbar, Frank W. Wachob, William T. Secor, E. R. Callister, Jr., Peter M. Lowe, Paul M. Hupp, Lowe P. Sicklons, Dennis O'Rourke, and Alden T. Hill were with them on the briefs) for intervening plaintiffs.

Messrs. William E. Doyle, Robert L. Simpson, Howard B. Black and Bert L. Overcash (Messrs. Don Eastvold, C. W. Ferguson, James B. Patten, Clarence S. Beck, and Richard H. Shaw were with them on the briefs) for intervening defendants.

Before PHILLIPS, Chief Circuit Judge, and KNOCH, Chief District Judge, and SAVAGE, District Judge.

Per Curiam.

This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and refused to establish and maintain competitive joint rates on freight traffic with the Rio Grande: (a) via its Colorado and Utah gateways between places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that through routes now exist and have for many years existed for the interchange of traffic by the Rio

Grande with the Union Pacific at Provo, Ogden and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic

(a) between points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the intermediate local or other rates, which rates and charges, in the aggregate, are substantially higher than the joint rates maintained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described re-

sults in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§1, 3 and 15 of the Interstate Commerce Act[1] and was and is contrary to the national transportation policy, since it deprives the public, shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competitive joint rates on the freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah, north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington, and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (c) the points designated in (a); and (d) Utah common points.

By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order which denied relief sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

---

1 Hereinafter called the Act.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

"It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Par. (4) of such Act in part provides:

"All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper * * *."

Section 13(1) of such Act in part provides:

"That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to

satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall

cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

I.

The Merits

The Rio Grande operates approximately 2400 miles of railroad in Colorado, New Mexico and Utah. From its northern terminus at Ogden, Utah, it runs south to Salt Lake City and Provo, Utah, thence generally east to Dotsero, Colorado, where it divides, one branch going east to Denver, the other southeast to Pueblo. From Denver the line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serving territories in southern Utah, northwest New Mexico and southern Colorado are not of importance in this action.

The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver,

Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and the Western Pacific at Salt Lake City. It has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, Santa Fe and the Colorado & Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern, and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through Salt Lake City and Provo and thence to Los Angeles. Another line extends northwest through Utah, Idaho, Oregon, Washington and Montana, serving what is referred to as the northwest territory, or the closed door territory. From Ogden, the Union Pacific runs generally easterly through Cheyenne and Denver, with eastern termini on the Missouri River at Omaha and Kansas City. At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in through routes and joint rates with each other and with other carriers on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in Utah, north of Ogden, and in Idaho, Montana, Oregon and part of Washington. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden,

the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather *[than over the Rio Grande route. This is due in part, to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic], transportation." It is further provided that in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier which originates the traffic. The section further provides that no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs. This section was designed

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 2 of Appendix E.

to restrict the power of the Commission to establish through routes which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought were in existence and open to traffic at combination rates, and that the Commission was not called upon to establish through routes and, therefore, limitations on its power to do so, imposed by §15(4), are not applicable and need not be considered. It urged that the principal task of the Commission was to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings, as specified in §15(3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

"That it is necessary and desirable in the public interest, in order to provide adequate and more eco-

nomic transportation, that through routes and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a narrow ground. We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under §15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a

representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made west bound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted

over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. *St. Louis-Southwestern R. Co. v. United States*, 245 U. S. 136, 139; *Thompson v. United States*, 343 U. S. 549, 556. In *Thompson v. United States, supra*, the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I. C. C. 163, 166.'
>
> * * * * *

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the *Thompson* case in reaching its decision that through routes were not in existence. But the facts in the *Thompson* case are in striking contract with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri-Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for some fifteen years. While the joint rates were canceled by Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participating railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency con-

ditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in *Virginian Railway Co. v. United States*, 272 U. S. 658. There, of 99 coal mines located on the line of the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> "* * * The Virginian contends that the order is void because the Commission directed the establish-

ment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (Citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern boundary of Colorado. They point out that there are some 2,900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we do not reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes

between the thousands of stations in the involved areas. It might be mentioned in passing that the court in the *Virginian Railway Company* case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered by the Supreme Court in *Secretary of Agriculture v. United States*, 347 U. S. 645.

II.

The Motion to Dismiss

*[We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We have further concluded that the Commission, in determining whether the Union Pacific Railroad and the other defendant railroads should be required to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint rates, as prayed for by the Rio Grande, erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act. The right of

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 3 of Appendix E.

the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See *Chicago Junction* case, 264 U. S. 258, 267, which cites with approval *Pennsylvania Co. v. United States,* 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 135-143; *Mitchell v. United States,* 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and *[equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defend-

*APPELLANTS' NOTE: The language included in brackets is modified by substituted pages 4 and 5 of Appendix E.

ants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4) and § 3(4) of the Act.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4) and § 3(4), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of § 1(4) and § 3(4) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]]

While it is our view that the denial of the relief here challenged will result in pecuniary injury to the

---

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

Rio Grande, we do not think such injury is essential to the right of judicial review. In *Mitchell v. United States*, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an action in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.
>
> "Nor is it determinative that it does not appear that appellant intends to make a similar rail-

road journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

"The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304; General American Tank Car Corp. v. El Dorado Terminal Co, 308 U. S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

*[There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission,

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 6 of Appendix E.

that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the] continuation of a so-called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the *Chicago Junction* case, *supra*, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255, said:

> "* * * We are of the opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give

them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of his own is alleged to have been violated by the order.* * * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. *They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.)

Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U. S. 479, the Commission entered an order authorizing the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Rail-

way Company had for some years owned and maintained an independent passenger station at Ontario Street, in Cleveland, in the line of the easterly approach to the proposed union terminal. It was apparent that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the public convenience and necessity would be served by the granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's

4 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

In *Moffat Tunnel League v. United States*, 289 U. S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

> "* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U. S. 143, 148. Sprunt & Son v. United States, 281 U. S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The *Pittsburgh & West Virginia Railway* case and the *Moffat Tunnel League* case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on its line, deny them equality of treatment, and cause injury to them.

It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the *Rochester Telephone* case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise.

considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling *Proctor & Gamble v. United States*, 225 U. S. 282, the court, at page 136, in the *Rochester Telephone* case, *supra*, observed that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

APPENDIX E

In the United States District Court
For the District of Colorado

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order

It is ordered by the court that the opinion heretofore filed herein be modified by substituting for pages 14, 29, 31, 32 and 36 thereof the following pages numbered 14, 29, 31, 32 and 36 and by the changes reflected in such last-mentioned pages:

[Substituted Page]

than over the Rio Grande route. This is due, in part to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates under §15(3) is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through rate unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic

Appendix E

[Substituted Page]

II.

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We further conclude that the Commission erred as a matter of law in applying the limitations of §15(4) with respect to the establishment of through routes, in determining whether the Union Pacific and the other defendant railroads should be required to establish and maintain for the future just, reasonable and non-discriminatory competitive joint rates under the provisions of §14(4), §3(4), §15(1) and §15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in §1(4), §3(4), §15(1) and §15(3) of the Act. The right of the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by

[Substituted Page]

equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of §1(4), §3(4), §15(1), and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes.

If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the

[Substituted Page]

Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the Facts established by the evidence before th Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

[Substituted Page]

There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the

(Signed) Royce H. Savage
District Judge

(Signed) William Lee Knous
District Judge

(Signed) Orie L. Phillips
Circuit Judge

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants,

Union Pacific Railroad Company, et al.,
Intervening Defendants.

Filed Feb. 14, 1955

Final Judgment and Decree

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28, U. S. C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully advised in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

NOW, THEREFORE, upon the basis of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, IT IS ORDERED, ADJUDGED AND DECREED that the injunction and other relief prayed for by plaintiff and intervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

DATED this 1st day of February, 1955.

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals

/s/ ROYCE H. SAVAGE
Royce H. Savage, Judge
United States District Court

/s/ WILLIAM LEE KNOUS
William Lee Knous, Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

vs.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order Denying Motion for New Trial or Reargument and Reconsideration

---

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein, having seasonably filed their motion for new trial or reargument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

IT IS ORDERED:

1. That said motion be and it is hereby overruled and denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

DATED at Denver, Colorado, this 22 day of April, 1955.

By the Court:

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals
for the Tenth Circuit

/s/ ROYCE H. SAVAGE
Royce H. Savage,
United States District Judge for the
Northern District of Oklahoma

/s/ WILLIAM LEE KNOUS
William Lee Knous,
United States District Judge.

APPENDIX H

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49) Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)--

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."